Filed 2/9/16 In re J.T. CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re J.T., a Person Coming Under the Juvenile Court Law.	
SAN FRANCISCO HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. Y.H., Defendant and Appellant.	A142880 (San Francisco County Super. Ct. No. JD123162)

Y.H. was a de facto parent and caretaker of a minor within the jurisdiction of the juvenile court. She appeals from the denial of her petition under Welfare and Institutions Code section 388, in which she contested the decision of respondent San Francisco Human Services Agency (Agency) to change the placement of the minor from her custody to the custody of another relative. Y.H. contends the juvenile court erred because (1) the Agency made the placement change without first obtaining a court order, and (2) the Agency abused its discretion in changing the placement in light of the best interests of the minor. We will affirm the order.

I. FACTS AND PROCEDURAL HISTORY

A. Detention

The minor, J.T., was born in March 2012. He was premature at 27 weeks and weighed 1 pound 13 ounces.

The Agency filed a dependency petition under Welfare and Institutions Code section 300, subdivision (b)[1] in June 2012, alleging that mother tested positive for cocaine and marijuana during her pregnancy, as recently as six weeks before the minor's birth.

According to the Agency's Detention/Jurisdiction Report, mother had failed to keep prenatal care appointments and admitted using marijuana and cocaine during her pregnancy. Father had not participated in drug testing and training in caring for a premature baby while the minor was hospitalized, and a pending dependency case in another county alleged that he had neglected his 19-month-old son. There were also concerns that mother and father were in an abusive relationship.

Mother contacted the Agency to suggest that her own mother—the maternal grandmother, N.F.—be considered for placement. The Agency approved N.F. for placement and placed the minor with her on June 8, 2012.

At the detention hearing, the juvenile court ordered the minor detained, with temporary placement and care vested in the Agency pending disposition; the court approved the necessary and appropriate placement with a relative.

B. Jurisdiction and Disposition

On July 20, 2012, the Agency filed a Disposition Report in advance of the hearing on jurisdiction and disposition. Although grandmother N.F. was attached to the minor and providing adequate care, there was conflict between N.F. and the parents. Father, who had been declared the minor's presumed father, wanted the minor placed instead with his sister—appellant Y.H.—but he had not provided her contact information.

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[1] All further undesignated statutory references are to the Welfare and Institutions Code.

Because N.F.'s family and the minor were forming attachments, the Agency recommended that the minor remain with N.F.; the Agency also recommended that the parents receive reunification services.

On August 24, 2012, the parents submitted on an amended dependency petition and the Agency reports. The court declared the minor a dependent, committed him to the "care and custody of the [Agency] for placement, planning and supervision," and approved his placement with a relative.

C. Six-Month Review

After the disposition order, the Agency moved the minor from N.F.'s home to the home of father's sister, appellant Y.H.

On February 4, 2013, the Agency filed a status review report for the six-month review hearing. Child protective services worker Macario Dagdagan reported that mother had relapsed and had not engaged in services, while father had engaged in services and appeared committed to reunification. The minor's basic needs were met in appellant's home, although appellant and N.F. had conflicts coordinating times for N.F. to visit.

At the six-month review hearing, the court renewed the dependency, ordered that the minor remain in the Agency's care and custody for placement, planning, and supervision, and approved the "necessary and appropriate placement with a relative."

D. Twelve-Month Review

The Agency's status report for the 12-month review hearing advised that mother had not engaged in services, father had engaged in services, and appellant provided the minor with his basic needs and adequate care. The Agency recommended that mother's reunification services be terminated, and that the minor be returned to father (under the Agency's care and control) with family maintenance services.

At the 12-month review hearing on August 8, 2013, the court renewed the dependency, vacated the relative placement order, and ordered the minor returned to

father. The court terminated reunification services for mother and ordered family maintenance services for father.

E. Agency's Section 387 Supplemental Petition, Detention, and Disposition

On August 22, 2013, the Agency filed a supplemental petition under section 387, alleging that father had tested positive for cocaine and, having learned from paternity testing that he was not the minor's biological father, requested that the minor be removed from his care. The Agency indicated that the minor had been removed from father's custody on August 16, 2013, and placed again with appellant Y.H., now identified as a non-related extended family member.

The Agency's detention report recommended that father be provided reunification services, the minor remain in appellant's care "until a long-term permanency plan can be devised," and visitation be determined for father and N.F.

At the detention hearing on August 23, 2013, the court ordered the minor detained, vested temporary care and placement with the Agency pending disposition, and approved placement "with a non-related extended family member."

On September 18, 2013, the court sustained the Agency's supplemental petition under section 387; vacated the prior order placing the minor with father; ordered the minor to remain in the Agency's care and custody for placement, planning, and supervision, and approved the placement with a non-related extended family member; ordered continuing reunification services for father; and set the matter for an 18-month review hearing.

F. Eighteen-Month Review

In its December 2013 status review report for the 18-month review hearing, the Agency recommended termination of reunification services for father and the setting of a selection and implementation hearing under section 366.26. The Agency explained that, among other things, father had not engaged in services and again tested positive for cocaine.

A Team Decision Meeting was held on November 11, 2013. The team determined that it would be in the minor's best interests to remain at that time in his placement with appellant. However, both N.F. (and her husband) and appellant (and her husband) were interested in adopting or having legal guardianship of the minor. The Agency opted to wait for a bonding assessment before deciding "what is in the best interest of [the minor] for permanency." The report identified the concurrent planning as "Legal Guardianship or adoption" by appellant *or* N.F.

At the continued 18-month review hearing on January 2, 2014, Dagdagan testified, among other things, that the homes of appellant and N.F. had been identified as potential adoptive homes. The Agency asked that reunification services be terminated and a hearing be set under section 366.26.

The court terminated reunification services for father and mother. It further ordered that the minor would remain in the Agency's care and custody for placement, planning, and supervision, and approved the necessary and appropriate placement "with a relative."

G. Order Granting De Facto Parent Status to Appellant and N.F.

Both appellant and N.F. filed applications to be identified as de facto parents. In a letter attached to N.F.'s application, she described instances in which appellant had told her that she could not visit with the minor on holidays or over a weekend, for reasons that turned out to be false.

At the hearing on the de facto parent applications, the Agency's counsel and minor's counsel advised the court that both N.F. and appellant qualified to be de facto parents.

The court granted de facto parent status to N.F. and appellant.

H. Agency's Section 366.26 Report Recommending Adoption by N.F.

The Agency filed its "366.26 WIC Report" on April 16, 2014. The report advised that the minor had a strong connection to both appellant and N.F. N.F. and her family

had been having biweekly weekend visits with the minor, traveling from Sacramento to pick him up in Hayward, and returning him afterward.

The Agency's 366.26 report now identified *N.F.* as the prospective adoptive family. The report asserted that N.F. wanted to adopt the minor out of her love for him and to provide the cultural and familial connection he would need in order to thrive, and she sincerely feared she would lose a relationship with him if he were placed with appellant, due to appellant's "resistance to connect [the minor] with [his] family." While the minor had been placed with appellant due to the parents' request for an easier commute for visitation, N.F. "made every attempt to maintain contact with her grandson" and had been visiting him since that time at least once a month. She was committed to taking full legal and financial responsibility for the minor, while exposing him to both sides of his family and "honor[ing] [his] bi-racial background of African American and Filipino descent in order to foster a stronger sense of cultural identity."

The Agency recommended against placing the minor with appellant, on the other hand, because she had "proven to be highly rigid, unstable, and inflexible in her ability to work with the Agency, the parents, and family members." Dagdagan questioned whether appellant would provide the minor with the support and connections he would need to "thrive and succeed in a healthy home environment that includes the minor's best interest," including necessary "familial, cultural, and emotional support." He believed N.F. and her family would provide the needed "love, care, support, and bio-psycho-social connections."

Dagdagan also described a bonding assessment conducted by a clinical psychologist, Dr. Valata Jenkins-Monroe, which purportedly opined that the minor would be able to transition from appellant's home to N.F.'s home "with relative ease and without any harm to the minor at this stage of his life." In essence, Dr. Jenkins-Monroe supported the permanent placement with N.F.

I. Agency Moves Minor from Appellant's Home to N.F.'s Home

After receiving Dr. Jenkins-Monroe's report, Dagdagan consulted with the Agency's program manager and his supervisor, along with minor's counsel; together they determined that the minor should be moved to N.F.'s home at the beginning of May 2014.

By Dagdagan's account, he went to appellant's home on April 8, 2014, and told her that the Agency was recommending that the minor be moved to live with N.F. Two days later, Dagdagan told appellant by telephone that a meeting would be held to create a transitional plan for the minor to be moved to N.F.'s home.

On April 16, 2014, the Agency conducted "a final administrative review to discuss permanency and what was in the best interest of [the minor]," and concluded it was not in the minor's best interests to remain in appellant's care, and that adoption by N.F. and her family "would provide the best possible outcome for [the minor] because they have demonstrated a healthy and responsible relationship with [appellant], the mother and the presumed father." On April 16, 2014, Dagdagan notified all counsel that the Agency would be moving the minor to N.F.'s home. No party objected.

The transitional plan meeting took place on April 30, 2014. Those present included Dagdagan, appellant, N.F., minor's counsel, Dr. Jenkins-Monroe, and Dagdagan's supervisor. The team worked together to plan transportation and a visitation schedule.

J. Appointment of Counsel for N.F. and Appellant as De Facto Parents

When the case was called for the section 366.26 hearing on May 7, 2014, the Agency's counsel apprised the court that the minor had been moved to N.F.'s home. The court appointed counsel for appellant and N.F. as de facto parents and set the matter for a contested section 366.26 hearing on July 14, 2014.

K. Appellant's First Section 388 Petition Regarding Placement

In June 2014, appellant filed a petition under section 388 to change the juvenile court's August 2012 disposition order that "the child be committed to the care, custody,

and control of the Department of Human Services for placement, planning, and supervision." Appellant asked the court to review the Agency's placement change from appellant to N.F., designate appellant as a prospective adoptive parent, and return the minor to appellant under a specific placement order.

Appellant supported her section 388 petition with a declaration in which she accused N.F.'s husband of "not want[ing] those black people in his home" and accused the protective services worker of favoring N.F. because he and N.F. are Filipino. She also noted that N.F. has a five-and-a-half-year-old daughter and a son "who is wheel-chair bound" and she "works on top of her family responsibilities."[2]

The court set the hearing on appellant's section 388 petition for July 14, 2014, the same date as the contested section 366.26 proceeding.

L. Agency's Response to Appellant's Section 388 Petition

In its response to the section 388 petition, the Agency advised there were two families interested in adopting the minor. Although the minor had been placed with appellant during reunification, "the Agency had some reservations with [appellant] due to her emotional and disruptive behaviors that would often cause conflict with the parents, [N.F.], and [Dagdagan]."

Dagdagan recounted how the Agency had awaited a bonding assessment to determine how well the minor was bonded to appellant and to N.F. before making a placement decision. Dagdagan had received the assessment report (which he attached to the Agency's response to the section 388 motion) on March 9, 2014. He asserted that the report indicated the minor was equally bonded to both appellant and N.F., but appellant was described as argumentative, reluctant to participate in the assessment, and

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[2] Appellant's counsel also submitted a declaration, in which she averred that the court's prior placement order had "vested custody in the Agency with discretion to select a suitable placement," appellant was entitled to the "caretaker preference" under section 366.26, subdivision (k), and the minor should be returned to appellant with a "*specific* placement order naming" appellant. The significance of counsel's indication that the court's prior order was a general placement order rather than a specific placement order is discussed *post*.

disparaging of the maternal family. Dr. Jenkins-Monroe warned that it was important for the minor's caregivers to understand his "developmental needs and best interest" and that "it is not [in] his best interest to be in any home that minimizes his biological family's participation and desire to be [a]part of his permanent life." Dr. Jenkins-Monroe concluded that she supported permanent placement with N.F. This report, Dagdagan maintained, was consistent with the Agency's own concerns about appellant's "accusatory and argumentative nature." Further, the Agency's doubts about appellant's "ability to provide for [the minor's] best interest with [his] familial connection" led the Agency to determine that placement with appellant "would impact his emotional, social, and psychological health."

Dagdagan also described his notification to appellant that the minor would be moved (see *ante*) and advised he had not seen racism in N.F.'s home.

M. Appellant's Motion for Declaratory Relief and Second Section 388 Petition

On July 8, 2014, while appellant's first section 388 petition was pending, appellant requested an order shortening time on a motion for declaratory relief and a second section 388 petition.

The motion for declaratory relief sought, in essence, an order requiring the Agency to file a supplemental petition under section 387 so the court could review its actions and conduct a disposition hearing pursuant to section 361.3. Appellant argued that even though the existing placement order was a "general" placement order, and the minor was moved from one relative to another relative, the court should require the Agency to file a supplemental petition. The motion for declaratory relief was set for a hearing on July 14, 2014 (the date for the hearing on appellant's first 388 petition and the contested section 366.26 proceeding).

Appellant's second section 388 petition again sought to change the court's August 2012 order, which provided that "the child be committed to the care, custody, and control of the Department of Human Services for placement, planning, and supervision." The petition sought an order requiring the Agency to file a supplemental petition with respect

to its removal of the minor from appellant's home on May 2, 2014, a new disposition hearing, and the return of the minor to appellant. The court summarily denied appellant's second section 388 petition on the ground that it did not state new evidence or a change in circumstances.

N. Hearing and Orders

1. Appellant's Motion for Declaratory Relief

At the hearing on July 14, 2014, after argument by counsel, the court denied appellant's motion for declaratory relief.

2. Appellant's First Section 388 Petition

The hearing then proceeded as to appellant's section 388 petition. Appellant testified concerning, among other things, her belief that N.F.'s husband is racist, her care for the minor, her interactions with mother, and N.F.'s visitation.

Dagdagan testified, among other things, that the biggest concern about appellant as a permanent placement was that she would not maintain familial connections for the minor over the long term. He also recounted his discussion with appellant concerning the change of placement, and he testified about a "Family Team Decision meeting" in November 2013, before the 18-month review hearing, in which it was suggested that a bonding assessment would be used in deciding the minor's permanent placement.

When the hearing reconvened on August 1, 2014, Dagdagan described the various factors the Agency had considered in recommending a permanent placement, including the length of time the minor had lived with appellant, the conflict between appellant and father, and whether appellant or N.F. was more likely to ensure that the minor was able to maintain a connection to both sides of his family. In addition, Dagdagan described how he placed a referral for the bonding assessment, consulted with the program directors and his supervisor, spoke with Dr. Jenkins-Monroe after receiving her report, and undertook an administrative review that included input from other Agency personnel. At the transition meeting attended by minor's counsel, N.F., appellant, Dr. Jenkins-Monroe, the Agency's program director, Dagdagan's supervisor, and one of the acting supervisors,

they collectively developed a transition plan to minimize the trauma resulting from the move.

After the close of testimony, appellant's counsel argued that the Agency had abused its discretion in moving the minor to N.F.'s home. However, minor's counsel, mother's counsel, the Agency's counsel, and N.F.'s counsel all argued that the Agency had not abused its discretion.

The court denied appellant's section 388 petition, finding that the Agency had not abused its discretion in moving the minor from appellant's home to N.F.'s home. The court explained: "[The Agency] went through a thoughtful[,] difficult process. It brought in a professional. The team at the Agency had group meetings to determine the best way to proceed." The court noted that, with two potential adoptive families, the Agency had to look at the "fine points," and "one of the fine points was that there was a perception based on evidence that [N.F.] had the ability to maintain connections for the child to other family members and that [appellant] did not[,] and that her rigidity and inflexibility on issues would interfere with that."

3. Section 366.26 Hearing

The court then proceeded with the section 366.26 hearing. Dagdagan testified that father recently told him that he would like to have the minor placed with N.F., and mother also supported adoption by N.F. The court found that the minor was likely to be adopted, terminated the parents' parental rights, and specified adoption as the minor's permanent plan.

On August 11, 2014, the court entered the order terminating parental rights under section 366.26. The order identified the permanent plan as placement with a relative for adoption, and granted visitation to the parents and to appellant.

O. Notice of Appeal

Appellant filed a notice of appeal from the order denying the motion for declaratory relief, the order denying the first section 388 petition, and the order denying a hearing on the second section 388 petition. Appellant's opening brief addresses only the

order denying the first section 388 petition, in which the court found that the Agency had not abused its discretion when it moved the minor to N.F.'s home.

II. DISCUSSION

A. Standing

Respondent urges that, because appellant was a de facto parent, she lacks standing to challenge the Agency's placement of the minor with N.F.

Generally, a de facto parent—who does not have a right to placement of the minor or entitlement to reunification services, custody, or visitation—has no standing to appeal an order approving the agency's placement of the minor to someone else. (*In re P.L.* (2005) 134 Cal.App.4th 1357, 1361-1362 (*P.L.*); see *In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1342-1343 (*Alexandria P.*) [de facto parent could not challenge ICWA placement preferences]; see also *In re Cynthia C.* (1997) 58 Cal.App.4th 1479, 1490-1491 (*Cynthia C.*) [de facto parent did not have right to continued placement of minor in her home]; accord *In re Vincent M.* (2008) 161 Cal.App.4th 943, 948-952.)

However, unlike the de facto parent in *P.L.* who had appealed from an order placing the child with someone else, appellant here is appealing from an order denying her *section 388 petition*, which she had filed to protect her own interests as caregiver. There is no dispute that appellant was an "interested person" with standing to file the section 388 petition. Appellant was aggrieved by the denial of her section 388 motion, and we conclude she has standing to challenge it. (See *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1035-1036.)

B. Requirement of Court Order for Change of Placement

Appellant contends the Agency could not change the minor's placement from appellant to N.F. without first obtaining an order from the juvenile court under section 388. This, she maintains, is because the operative placement order at the time of the Agency's placement change—that is, the order issued as a result of the 18-month review—was a *specific* placement (with appellant) rather than a general placement.

Appellant did not raise this argument in the juvenile court, and in any event she is incorrect.

1. Waiver and Forfeiture

Appellant's first section 388 petition, filed on June 4, 2014, sought to change the court's prior order that the minor be committed to the care, custody, and control of the Agency for placement, planning, and supervision. At no time, however, did appellant contend that the Agency's move of the minor from appellant to N.F. was improper because the Agency had not first obtained a new order permitting the change. Nor did appellant ever argue that the existing placement order—or *any* placement order in the case—was a specific placement order rather than a general order.

To the contrary, appellant suggested that the court's prior order was a *general* order. In connection with her section 388 petition, appellant requested that the court issue an order for the "[r]eturn of [the minor] to [appellant] *with a specific placement order naming them*." (Italics added.) In support of the petition, appellant's counsel wrote, "The court's placement ordered [*sic*] *vested custody in the Agency with discretion to select a suitable placement*." (Italics added.) Counsel asked the court to "conduct a placement review hearing of the Agency's 'relative to relative' change of placement" and return the minor to appellant's home "with a *specific* placement order naming them." (Original italics.) And in her motion for declaratory relief, appellant argued that *even though the court had made a "general" placement order* and the minor was moved from relative to relative, the court should require the Agency to file a supplemental petition under section 387.[3]

As a general matter, we do not consider claims made for the first time on appeal. (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11; *Alexandria P.*, *supra*, 228 Cal.App.4th at p. 1346.) Appellant did not contend the placement was erroneous on the ground it was made without a section 388 order, or that the prior placement order was

[3] Appellant now acknowledges that no section 387 order was required.

a specific rather than general placement; if she *had* made those arguments, the parties and the court could have addressed them at the time. Her challenge is waived and forfeited.[4]

Appellant urges that we have discretion to consider a legal theory raised for the first time on appeal when it involves primarily a question of law, or mixed question of law and fact, that may be resolved by undisputed facts in the record and raises an important policy question. (Citing, e.g., *In re Stuart S.* (2002) 104 Cal.App.4th 203, 206; *In re P.C.* (2006) 137 Cal.App.4th 279, 287-288.)

For the sake of providing a full analysis, we will proceed to the merits of appellant's argument.

2. Change of Placement Did Not Require Section 388 Order

A *general* placement order is one that requires the child's custody to be supervised by the social worker, who administers the order by placing the child in foster care or as appropriate. (See *In re Robert A.* (1992) 4 Cal.App.4th 174, 179, 180 & fn. 2, 190 (*Robert A.*); § 361.2.) Because a general order leaves placement at the discretion of the agency, the agency may proceed to change the placement (consistent with the terms of the existing order) without going to the court for a new order, subject to judicial review pursuant to a section 388 petition filed by a party opposing the change. (*M.L. v. Superior Court* (2009) 172 Cal.App.4th 520, 529 [where court has issued general placement order, agency has discretion to place child]; see Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2015) § 2.141[1].)

A *specific* placement order, by contrast, is one that instructs the agency to make a *particular placement*. (See *Robert A.*, *supra*, 4 Cal.App.4th at pp. 179, 180 & fn. 2, 190.) Because a specific order permits only a particular placement, the agency cannot change the placement without first filing its own petition and obtaining a new order from the court. (See *Cynthia C.*, *supra*, 58 Cal.App.4th at pp. 1489-1491 [agency did not have to

[4] Respondent contends appellant not only waived her argument that the Agency should have obtained a court order, but is also precluded from asserting the argument based on the doctrine of judicial estoppel. We need not and do not decide this issue.

file § 387 petition to remove child from home of de facto parents because court had entered general rather than specific placement order].)

Here, the order issued at the 18-month review in January 2014 provided for placement as follows: The minor is to "remain in the care and custody of the Department of Human Services [Agency] for placement, planning and supervision and the Court approves the necessary and appropriate placement . . . with a relative."

This is a general placement order. (See *Robert A.*, *supra*, 4 Cal.App.4th at p. 180; § 361.2, subd. (e) [authority of court to "order the care, custody, control, and conduct of the child to be under the supervision of the social worker who may place the child in any of" certain delineated placements, including "[t]he approved home of a relative"].) Indeed, appellant acknowledges that the language on the form used by the court in the 18-month review order is that of a general rather than specific placement. Appellant further acknowledges that "the juvenile court never wrote in wording that [the minor] be specifically placed with [appellant], or that placement with [appellant] not be changed without a court order."

Appellant nonetheless contends the record as a whole suggests the 18-month review order was a specific placement with appellant, because the Agency had recommended that placement be with appellant. We disagree. In the first place, the Agency's 18-month review report noted that *both* appellant and N.F., not just appellant, offered potential adoptive homes. Moreover, regardless of any specifics the Agency recommended, the court ultimately opted to employ the language indicating a general placement ("with a relative") rather than a specific placement with appellant. Indeed, every order of placement in the case—from the initial disposition order through the 18-month review order—used the language of a general placement, and the record does not indicate that anyone in the juvenile court proceedings considered this to be erroneous.

Appellant also points to the court's oral statement at the end of the 18-month review hearing: "[The minor] will remain in the care and custody of the Department. And the Court approves the continuing placement with a relative, *Ms. H*[ ]." (Italics added.) But that is not the court's *order*. "The court's order is that which is written,

signed and filed. (Code Civ. Proc., § 1003.) To the extent that the court's oral pronouncement differed from its written order, the written order controls." (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 756, fn. 1.)

Appellant has failed to establish that the placement order in effect at the time the Agency moved the minor to N.F.'s home was a specific placement order; she therefore fails to show that the move required the Agency to obtain a section 388 order.

C. Denial of Appellant's Section 388 Motion Challenging the Placement

As just discussed, the Agency's change of placement from appellant to N.F. cannot be challenged because the *Agency* failed to obtain a section 388 order *before* the change of placement. We therefore turn to whether the court erred in denying *appellant's* motion for a section 388 order *challenging* the Agency's change of placement.

We review the denial of a section 388 petition for an abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 319.) When the juvenile court reviews an agency's determination that a change of placement is in the child's best interests, "the [juvenile] court must assess whether [the Agency] acted arbitrarily and capriciously, *considering the minor's best interests*." (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 72 (*Shirley K.*).)

1. No Abuse of Discretion

Ample evidence supported the juvenile court's conclusion that the Agency did not abuse its discretion in moving the minor to N.F.'s home, in light of the minor's best interests. The evidence before the court was that the decision to move the minor was made over the course of time, in consultation with an outside clinical psychologist, minor's counsel, and Agency personnel. The decision was based on factors including (1) appellant's negative interaction with the child protective services worker, the clinical psychologist, N.F., and father (appellant's own brother); (2) the fact that the minor was bonded to N.F. as well as to appellant; and (3) the determination that N.F. was more likely to maintain the minor's association with both sides of his family. The juvenile court considered the minor's best interests, observing that "[w]e're not just looking for nurturing and health care and feeding and school," but the finer points such as "a

perception based on evidence that [N.F.'s family] had the ability to maintain connections for the child to the other family members and that [appellant] did not[,] and that her rigidity and inflexibility on issues would interfere with that."

Appellant urges that the Agency did not provide evidence that the minor was equally bonded with appellant's family and N.F.'s family, since Dr. Jenkins-Monroe did not perform a formal bonding study or explicitly opine on the comparative strength of his bonds with appellant and N.F. Further, appellant argues, there was no evidence the minor would not suffer significant emotional or psychological detriment from the move, as Dr. Jenkins-Monroe did not specifically opine that the placement change would not cause the minor substantial emotional trauma.

Appellant's arguments are meritless. Dr. Jenkins-Monroe confirmed that both appellant and N.F. *acknowledged* that the minor was "*bonded and attached to both of them*." (Italics added.) She noted that the minor had been "placed with his maternal grandmother in Sacramento [N.F.], who *bonded and attached to him*." (Italics added.) And when concluding that placement should be with N.F. rather than appellant, Dr. Jenkins-Monroe explained that the minor was a "bondable little boy," suggesting that the placement change would not cause the minor undue trauma.

2. Caretaker Preference (Section 366.26, Subdivision (k))

Appellant contends the Agency abused its discretion by failing to consider whether she qualified for the caretaker preference under section 366.26, subdivision (k), which reads, in pertinent part: "[T]he application of any person who, as a relative caretaker . . . has cared for a dependent *child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption*, shall be given preference with respect to that child over all other applications for adoptive placement *if* the agency making the placement determines that the child has substantial emotional ties to the relative caretaker . . . and removal from the relative caretaker . . . would be seriously detrimental to the child's emotional well-being." (Italics added.)

Section 366.26, subdivision (k) does not apply to the matter at hand. By its terms, it applies only after the court "has approved a permanent plan for adoption" or where the minor "has been freed for adoption." (See *In re Lauren R.* (2007) 148 Cal.App.4th 841, 855-856 (*Lauren R.*) [caretaker preference applies upon intent to place child for adoption, such as court's approval of permanent plan of adoption under § 366.26, subd. (c)(3)].) Here, although the 18-month review order stated that the permanent plan was for adoption, the order was not made under section 366.26, which specifies the "exclusive procedures for permanently terminating parental rights with regard to . . . the child while the child is a dependent child of the juvenile court." (§ 366.26, subd. (a).) The court's findings under section 366.26, subdivision (c)(3) were not made until three months *after* the minor was moved to N.F.'s home.

Moreover, even if section 366.26, subdivision (k) had applied, the Agency's failure to consider whether appellant qualified for the caretaker preference was harmless. A caretaker's adoption application is given preference only if the agency determines that (1) the child has substantial emotional ties to the caretaker *and* (2) removal from the caretaker would be seriously detrimental to the child's emotional well-being. (§ 366.26, subd. (k); *Lauren R.*, *supra*, 148 Cal.App.4th at pp. 859-860.) Here, after consulting with Dr. Jenkins-Monroe, the Agency concluded that moving the minor would *not* be seriously detrimental to his emotional well-being, and there is no finding that it would.

3. Section 366.26, Subdivision (n)

Appellant contends the juvenile court should have ruled that the Agency was not authorized to change the minor's placement without a hearing under section 366.26, subdivision (n)(3). That provision entitles a "current caretaker" to notice of the agency's intent to move a child from the home of a prospective adoptive parent if the current caretaker meets the criteria to be designated a "prospective adoptive parent." (See *In re M.M.* (2015) 235 Cal.App.4th 54 (*M.M.*).)

In enacting subdivision (n), " 'the Legislature intended to 'limit the removal of a dependent child from his or her caretaker's home *after parental rights are terminated*, if

the caretaker is a designated or qualified as a prospective adoptive parent." ' " (*M.M., supra,* 235 Cal.App.4th at p. 62 [where juvenile court terminated parental rights and removed minor from foster mother at same hearing and by same order, foster mother was entitled to notice and opportunity to object to minor's removal under § 366.26, subd. (n)(3) because she qualified as prospective adoptive parent under subd. (n)(1) & (2)].) Thus, the notice requirements of section 366.26, subdivision (n)(3) "do not apply when a child is removed from potential prospective adoptive parents *prior* to the termination of parental rights." (*In re Jayden M.* (2014) 228 Cal.App.4th 1452, 1457-1459; *M.M., supra,* 235 Cal.App.4th at pp. 61-62.)

Here, the minor was moved three months before parental rights were terminated. Notice was not required under section 366.26, subdivision (n).

4. Incorrect Legal Standard

Appellant contends the Agency and Dr. Jenkins-Monroe completely ignored the fact that placement changes disruptive of a child's bond with a caretaker are not in the child's best interests and should be avoided in the absence of significant detriments or dangers posed by the caretaker. We disagree. The record indicates that the Agency and Dr. Jenkins-Monroe did consider the effects of the change of placement; moreover, appellant points to no evidence that, in *this* particular case, the change of placement would cause emotional or psychological detriment to the minor.

Appellant further urges that the juvenile court must have applied an incorrect legal standard, speculating that the court decided it could not independently review whether the Agency's determination of the minor's best interests comported with the principles of the statutory scheme, but could only review whether the Agency had used a rational process in reaching its conclusion. (Citing *Shirley K., supra,* 140 Cal.App.4th at p. 72 [in reviewing agency's placement decision, juvenile court may not review merely whether agency properly evaluated placement in light of minor's best interests, but must review whether placement *was* in minor's best interests].) Appellant says "it appears that, as in *Shirley K.*, the court erroneously believed that its judicial judgment on the best interests

issue was not relevant or that it had to defer to the Agency's judgment so long as the Agency appeared to have given that issue thoughtful consideration."

Appellant's aspersion against the juvenile court is unfounded. In the first place, we presume that the juvenile court was aware of, and followed, the law. (Evid. Code, § 664; *Natkin v. California Unemployment Ins. Appeals Bd.* (2013) 219 Cal.App.4th 997, 1013.) Appellant does not cite to any statement by the juvenile court that would suggest it was unaware of the proper scope of its review or that it opted not to follow the law. To the contrary, the record demonstrates that the juvenile court considered the minor's best interests in evaluating the Agency's change of placement and concluded the change of placement was in accord with the relevant principles.

Appellant fails to establish error.

III. DISPOSITION

The order is affirmed.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BRUINIERS, J.